A

All Kurma Sdn Bhd v Teoh Heng Tatt & Ors

B HIGH COURT (PENANG) — CIVIL SUIT NO PA-22NCC-30–09 OF 2021
KENNETH ST JAMES JC
5 AUGUST 2022

C *Civil Procedure — Injunction — Mareva injunction — Court granted ex parte Mareva injunction — Defendants applied to set aside Mareva injunction — Plaintiff filed application for ex parte Mareva injunction made inter partes — Whether ex parte Mareva injunction should be set aside — Whether ex parte* D *Mareva injunction should be granted inter partes — Whether plaintiff had good arguable case — Whether defendants had assets in Malaysia — Whether there was real risk of dissipation of assets — Whether there was non-compliance of O 29 r 1(2) & (2A) of the Rules of Court 2012 — Whether principle of balance of convenience applicable to application for Mareva injunction — Rules of Court* E *2012 O 29 r 1(2) & (2A)*

The plaintiff had sued the first defendant for breaches of statutory duty and fiduciary duty, and for conspiracy to injure. As against the other defendants, the plaintiff's action was premised on conspiracy to injure and dishonest F assistance. The court had granted the plaintiff's application for ex parte Mareva injunction prohibiting the first defendant, the seventh defendant and the eighth defendant ('the defendants') from disposing or dealing with their own assets up to approximately RM1m, which was the amount of the plaintiff's claim against each of them. In response, the defendants filed encls 30 and 32 to G set aside the ex parte Mareva injunction. Simultaneously, the plaintiff had filed encl 5 for an application that the ex parte Mareva injunction to be made inter partes. The issues to be determined by the court were: (a) whether the ex parte Mareva injunction should be set aside; (b) whether the ex parte Mareva injunction should be granted inter partes; (c) whether the plaintiff had good H arguable case; (d) whether the defendants had assets in Malaysia; (e) whether there was real risk of dissipation of assets by the defendants; and (f) whether the principle of balance of convenience was applicable to an application for Mareva injunction.

I **Held**, allowing encls 30 and 32 with costs and dismissing encl 5 with costs:

(1) There were certain requirements or prerequisites that the plaintiff must comply strictly with, to be granted an ex parte injunction. The requirements were prescribed in O 29 r 1 of the Rules of Court 2012 ('the ROC'). If an applicant in an ex parte application did not comply with the

strict requirements of O 29 r 1 of the ROC ie the duty to make full and frank disclosure, the ex parte injunction could be set aside, even if after eventual full disclosure, the court was of the view that the injunction should have been granted. The court found that the plaintiff had not sufficiently and purposefully satisfied the requirements under O 29 r 1(2) and O 29 r 1(2A) of the ROC. In the plaintiff's affidavit in support ('encl 6'), the plaintiff merely regurgitated the words and phrases used in O 29 r 1(2) and O 29 r 1(2A) to describe the requirements, without adequately particularising them (see paras 16, 20, 49 & 54).

(2) The first omission was under O 29 r 1(2) of the ROC whereby the plaintiff omitted to demonstrate why their application must be heard urgently. They did not show that it was likely, or expected, that the defendants would soon dissipate their assets out of Malaysia, beyond the reach of the plaintiff. Further, in para 102 of their affidavit in support, the plaintiff averred that 'the facts relied on to justify' the ex parte Mareva application 'have also been adequately set out above'. But what was 'set out above' in the earlier parts of their affidavit in support was merely about their causes of action and their claim against the defendants. These averments did not satisfy the requirements of O 29 r 1(2A) of the ROC (see paras 25–26 & 57).

(3) The second omission was under O 29 r 1(2A)(c) ie the facts relied on to justify an ex parte application. The plaintiff submitted that they were entitled to an ex parte Mareva injunction, by generally asserting that the first defendant had breached statutory, fiduciary and confidence duties, and conspired with the seventh defendant and the eighth defendant. The court found that these general assertions were insufficient for the purpose of satisfying the requirements of O 29 r 1(2A)(c) of the ROC. Further, there was no meaningful explanation in the plaintiff's statement as to why they did not give notice to the defendants. The applicant should not be allowed to by-pass this obligation to give notice of an injunction application, just by submitting that Mareva applications need to be made with secrecy (see paras 27, 30, 37 & 58–59).

(4) The plaintiff failed to fulfil the requirement under O 29 r 1(2A)(d) of the ROC which required the plaintiff to state what the defendants would or likely to say to oppose the Mareva injunction application. The court found that among the facts or matters which were known to the plaintiff that the first defendant expected to assert, or was likely to assert, in answer to the plaintiff's claim or in answer to the Mareva injunction application, which were relevant for the court to consider include: (a) the fact that the first defendant was only authorised to sign for transactions that amount to RM10,000 or below and he was not authorised to sign for transactions in US Dollars; and (b) the fact that the director-cum-shareholders of the plaintiff used the plaintiff to sell goods

to two companies that were in direct competition with the plaintiff 'at very favourable pricing and at cost' and the first defendant asserted that these two companies were 'reaping profits at the plaintiff's expense', to benefit the companies' shareholders. The plaintiff failed to disclose these facts in their application for Mareva injunction (see paras 43–45 & 60).

(5) The plaintiff failed to fulfil the requirements under O 29 r 1(2A)(e) of the ROC which provided that the plaintiff must state any facts that may lead the court not to grant the application ex parte, or not to grant the application at all. The plaintiff appeared to just cursorily say that they were unaware of such facts. Again, the plaintiff merely recited the statements, in an attempt to superficially satisfy this requirement (see paras 47 & 61).

(6) The first element to be considered in an application for Mareva injunction was whether the plaintiff had a good arguable case against the defendants. What 'a good arguable case' meant was that the plaintiff's case was 'more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than fifty percent chance of success'. In the present case, based on the pleadings, the court found that the plaintiff had a good arguable case. The second element was not disputed ie, that the defendants had assets within the jurisdiction (see paras 76–78).

(7) In relation to the third element, the plaintiff must demonstrate the real risk, not merely by arguing that the risk was there. The plaintiff must demonstrate this real risk of dissipation by a preponderance of evidence ie the evidence that it was likely that the defendants would dissipate their assets, for the sole premeditated purpose of frustrating the plaintiff's judgment. Further, beyond demonstrating that there was a real risk of asset dissipation, the plaintiff must demonstrate to the court that the premeditated dissipation was done intentionally to avoid a possible judgment. The real risk of dissipation could not be presumed from the plaintiff's mere allegation that the defendants had committed wrongful acts against the plaintiff. The court should not presume that there was a real risk of dissipation purely from the plaintiff's assertions that the defendants were dishonest. There must be direct evidence to support the assertions. There must be evidence that had a 'real and material bearing' on the risk of dissipation and evidence that could justify an inference of a real risk of dissipation. There was no such evidence in the present case. Therefore, the plaintiff had not demonstrated that there was a real risk that the defendants were likely to dissipate their assets, intended specifically to frustrate a possible judgment in the plaintiff's favour (see paras 82, 86, 88, 94–95 & 98).

(8) The issue of the applicability of the principle of balance of convenience to an application for Mareva injunction was answered by the Court of

Appeal in the case of *Lee Kai Wuen & Anor v Lee Yee Wuen* [2022] MLJU 03411; [2022] 5 AMR 109; [2022] 1 LNS 1057 (CA). In the said case, the court, inter alia, held that the purpose of a Mareva injunction was 'to prevent an abuse of the legal process' where a party who was facing judgment intentionally dissipated the assets in question, to avoid having to satisfy the judgment. The court further held that the balance of convenience was not one of the appropriate criteria for consideration when the court was deciding whether to grant a Mareva or Mareva-type injunction. As such, the balance of convenience criterion and other related factors such as 'the adequacy of damages' or the irreparability of the damage that may be caused if the interlocutory injunction was not granted — were not factors that ought to be considered in a Mareva application (see para 102).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan pertama kerana melanggar kewajipan berkanun dan kewajipan fidusiari, dan untuk konspirasi untuk mencederakan. Bagi defendan-defendan yang lain pula, tindakan plaintif adalah berdasarkan konspirasi untuk mencederakan dan bantuan tidak jujur. Mahkamah telah membenarkan permohonan plaintif untuk injunksi Mareva secara ex parte yang melarang defendan pertama, defendan ketujuh dan defendan kelapan ('defendan-defendan') daripada melupuskan atau berurusan dengan aset mereka sendiri sehingga nilai lebih kurang RM1 juta, iaitu jumlah wang yang dituntut oleh plaintif terhadap setiap daripada mereka. Sebagai tindak balas ke atas tindakan tersebut, defendan-defendan memfailkan lampiran 30 dan 32 untuk mengenepikan injunksi ex parte Mareva. Pada masa yang sama, plaintif telah memfailkan lampiran 5 untuk permohonan supaya injunksi ex parte Mareva dibuat secara inter partes. Isu-isu yang perlu ditentukan oleh mahkamah ialah: (a) sama ada injunksi ex parte Mareva harus diketepikan; (b) sama ada injunksi ex parte Mareva harus dibenarkan secara inter partes; (c) sama ada plaintif mempunyai kes yang boleh dipertikaikan; (d) sama ada defendan-defendan mempunyai aset di Malaysia; (e) sama ada terdapat risiko sebenar pelupusan aset oleh defendan-defendan; dan (f) sama ada prinsip imbangan kemudahan terpakai bagi permohonan untuk injunksi Mareva.

Diputuskan, membenarkan lampiran 30 dan 32 dengan kos dan menolak lampiran 5 dengan kos:

(1) Terdapat keperluan atau prasyarat tertentu yang wajib dipatuhi oleh plaintif dengan ketat bagi mendapatkan injunksi ex parte. Keperluan tersebut telah ditetapkan dalam A 29 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Jika pemohon dalam permohonan ex parte tidak mematuhi keperluan ketat A 29 k 1 KKM iaitu kewajipan untuk membuat pendedahan penuh dan terus terang, injunksi ex parte boleh diketepikan, walaupun kemudiannya pendedahan penuh dibuat dan

A mahkamah berpendapat bahawa injunksi tersebut sepatutnya diberikan. Mahkamah mendapati bahawa plaintif tidak memenuhi keperluan di bawah A 29 k 1(2) dan A 29 k 1(2A) KKM secara secukupnya dan secara bermakna. Dalam afidavit sokongan plaintif ('lampiran 6'), plaintif hanya mengulangi perkataan dan frasa yang digunakan dalam A 29 B k 1(2) dan A 29 k 1(2A) untuk menerangkan keperluan tersebut tanpa mengkhususkannya dengan secukupnya (lihat perenggan 16, 20, 49 & 54).

(2) Pelanggaran pertama adalah di bawah A 29 k 1(2) KKM di mana plaintif C tidak menunjukkan mengapa permohonan mereka mesti didengar dengan segera. Mereka tidak menunjukkan bahawa berkemungkinan, atau dijangka, dalam masa yang terdekat defendan-defendan akan melupuskan aset mereka keluar dari Malaysia, di luar jangkauan plaintif. Selanjutnya, dalam perenggan 102 afidavit sokongan mereka, plaintif D menegaskan bahawa 'fakta yang disandarkan untuk mewajarkan' permohonan ex parte Mareva 'juga telah dinyatakan dengan secukupnya di atas'. Tetapi apa yang 'dinyatakan di atas' dalam bahagian awal afidavit sokongan mereka adalah semata-mata berkenaan dengan kausa-kausa tindakan mereka dan tuntutan mereka terhadap defendan-defendan. E Hujahan-hujahan ini tidak memenuhi keperluan A 29 k 1(2A) KKM (lihat perenggan 25–26 & 57).

(3) Pelanggaran kedua adalah di bawah A 29 k 1(2A)(c) iaitu fakta yang disandarkan untuk mewajarkan permohonan ex parte. Plaintif berhujah F bahawa mereka berhak mendapat injunksi ex parte Mareva, dengan secara amnya menegaskan bahawa defendan pertama telah melanggar kewajipan statutori, fidusiari dan keyakinan, dan berkonspirasi dengan defendan ketujuh dan defendan kelapan. Mahkamah mendapati bahawa pernyataan am ini tidak mencukupi untuk tujuan memenuhi keperluan G A 29 k 1(2A)(c) KKM. Selanjutnya, tiada penjelasan bermakna dalam kenyataan plaintif tentang mengapa mereka tidak memberi notis kepada defendan-defendan. Pemohon tidak boleh dibenarkan untuk memintas kewajipan untuk memberikan notis permohonan injunksi, hanya dengan menghujahkan bahawa permohonan Mareva perlu dibuat secara H rahsia (lihat perenggan 27, 30, 37 & 58–59).

(4) Plaintif gagal memenuhi keperluan di bawah A 29 k 1(2A)(d) KKM yang memerlukan plaintif menyatakan apa yang defendan-defendan akan atau mungkin katakan untuk menentang permohonan injunksi Mareva. Mahkamah mendapati bahawa antara fakta atau perkara yang diketahui I oleh plaintif yang dijangka atau mungkin akan dihujahkan oleh defendan pertama sebagai jawapan kepada tuntutan plaintif atau sebagai jawapan kepada permohonan injunksi Mareva, yang relevan untuk dipertimbangkan oleh mahkamah termasuk: (a) fakta bahawa defendan pertama hanya dibenarkan menandatangani bagi transaksi yang

berjumlah RM10,000 atau ke bawah dan dia tidak dibenarkan menandatangani untuk transaksi dalam Dolar AS; dan (b) fakta bahawa pengarah merangkap pemegang saham plaintif menggunakan plaintif untuk menjual barang kepada dua syarikat yang bersaing secara langsung dengan plaintif 'pada harga yang sangat menguntungkan dan pada kos' dan defendan pertama menegaskan bahawa kedua-dua syarikat ini 'mengaut keuntungan atas perbelanjaan plaintif', untuk memberi manfaat kepada pemegang-pemegang saham syarikat-syarikat tersebut. Plaintif gagal mendedahkan fakta ini dalam permohonan mereka untuk injunksi Mareva (lihat perenggan 43–45 & 60).

(5) Plaintif gagal memenuhi keperluan di bawah A 29 k 1(2A)(e) KKM yang memperuntukkan bahawa plaintif perlu menyatakan apa-apa fakta yang boleh menyebabkan mahkamah tidak membenarkan permohonan secara ex parte, atau tidak membenarkan permohonan sama sekali. Plaintif nampaknya hanya sepintas lalu mengatakan bahawa mereka tidak mengetahui fakta sedemikian. Sekali lagi, plaintif hanya membacakan kenyataan, dalam usaha untuk memenuhi keperluan ini secara dangkal (lihat perenggan 47 & 61).

(6) Elemen pertama yang perlu dipertimbangkan dalam permohonan untuk injunksi Mareva ialah sama ada plaintif mempunyai kes yang boleh dipertikaikan yang baik terhadap defendan. Apa yang dimaksudkan dengan 'a good arguable case' adalah bahawa kes plaintif adalah 'more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than fifty percent chance of success'. Dalam kes ini, berdasarkan pliding, mahkamah mendapati bahawa plaintif mempunyai kes yang boleh dipertikaikan yang baik. Elemen kedua tidak dipertikaikan iaitu, defendan mempunyai aset dalam bidang kuasa mahkamah (lihat perenggan 76–78).

(7) Berhubung dengan elemen ketiga, plaintif perlu menunjukkan risiko sebenar, bukan semata-mata dengan berhujah bahawa risiko tersebut wujud. Plaintif perlu menunjukkan risiko sebenar pelupusan melalui 'preponderance of evidence' iaitu keterangan bahawa adalah berkemungkinan defendan akan melupuskan aset mereka, untuk tujuan tunggal yang dirancang untuk mengecewakan penghakiman plaintif. Selanjutnya, selain menunjukkan bahawa terdapat risiko sebenar pelupusan aset, plaintif mesti menunjukkan kepada mahkamah bahawa pelupusan yang dirancang telah dilakukan dengan sengaja untuk mengelakkan kemungkinan penghakiman. Risiko sebenar pelupusan tidak boleh diandaikan daripada dakwaan plaintif semata-mata bahawa defendan-defendan telah melakukan perbuatan salah terhadap plaintif. Mahkamah tidak seharusnya menganggap bahawa terdapat risiko sebenar pelupusan semata-mata daripada hujahan plaintif bahawa defendan adalah tidak jujur. Perlu ada keterangan langsung untuk

menyokong dakwaan tersebut. Perlu juga ada keterangan yang mempunyai 'kaitan sebenar dan material' terhadap risiko pelupusan dan keterangan yang boleh mewajarkan inferens risiko sebenar pelupusan. Tiada keterangan sedemikian dalam kes ini. Oleh itu, plaintif tidak menunjukkan bahawa terdapat risiko sebenar bahawa defendan-defendan berkemungkinan akan melupuskan aset mereka yang bertujuan khusus untuk menggagalkan kemungkinan penghakiman yang memihak kepada plaintif (lihat perenggan 82, 86, 88, 94–95 & 98).

(8) Isu kebolehgunaan prinsip imbangan kemudahan kepada permohonan injunksi Mareva telah dijawab oleh Mahkamah Rayuan dalam kes *Lee Kai Wuen & Anor v Lee Yee Wuen* [2022] MLJU 03411; [2022] 5 AMR 109 ; [2022] 1 LNS 1057 (CA). Dalam kes tersebut, mahkamah, antara lain, berpendapat bahawa tujuan injunksi Mareva adalah 'untuk mencegah penyalahgunaan proses undang-undang' di mana pihak yang menghadapi penghakiman dengan sengaja melupuskan aset yang terlibat, untuk mengelak daripada memenuhi penghakiman. Mahkamah seterusnya berpendapat bahawa imbangan kemudahan bukanlah salah satu kriteria yang sesuai untuk dipertimbangkan apabila mahkamah memutuskan sama ada untuk memberikan injunksi jenis Mareva atau Mareva. Oleh itu, kriteria imbangan kemudahan dan faktor lain yang berkaitan seperti 'kecukupan ganti rugi' atau ketidakbolehbaikan kerosakan yang mungkin boleh diakibatkan jika injunksi interlokutori tidak diberikan — bukan faktor yang perlu dipertimbangkan dalam permohonan Mareva (lihat perenggan 102).]

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316, HL (refd)

Creative Furnishing Sdn Bhd v Wong Koi [1989] 2 MLJ 153; [1989] 2 CLJ 93, SC (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293; [1995] 2 AMR 1859, CA (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1; [2003] 5 AMR 758, FC (refd)

Kosma Palm Oil Mill Sdn Bhd v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 316; [2004] 1 CLJ 239; [2004] 1 AMR 417, CA (refd)

Lee Kai Wuen & Anor v Lee Yee Wuen [2022] MLJU 03411; [2022] 5 AMR 109; [2022] 1 LNS 1057, CA (folld)

Menk Sdn Bhd v Joerg Hugo Schmidt [2009] 3 MLJ 205; [2010] 3 AMR 488; [2009] 4 CLJ 795, CA (refd)

Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Nidersachsen [1984] 1 All ER 398, CA (refd)

S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62; [1985] CLJ Rep 280, FC (refd)

Toyota Tsusho (M) Sdn Bhd v Lau Kum Foon & Ors [2019] 10 MLJ 596; [2019] 4 CLJ 110, HC (folld)
University of Malaya Medical Centre v Choo Chee Kon & Anor [2008] 3 MLJ 278; [2008] 5 CLJ 295, HC (refd)
Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd [1982] 1 MLJ 260; [1982] 1 LNS 34, FC (folld)

Legislation referred to

Rules of Court 2012 O 29 rr 1, (2), (2A), (2A)(c), (2A)(d), (2A)(e), O 45 r 7
Rules of the High Court 1980 (repealed by Rules of Court 2012) O 29 r 1(2A)

Elizabeth Lau (with Hazel Siau and Jessica Chew) (Elizabeth Lau) for the plaintiff.
Nicholas Tan (with Phoebe Ooi and Lee Fei Wen) (Lim Huck Aik & Co) for the first and sixth defendants.
B Jeyasingam (with Lee Jun Leong) (Ghazi & Lim) for the second, third, fourth, fifth, seventh and eighth defendants.

Kenneth St James JC:

PRELUSION

[1] The plaintiff obtained an ex parte Mareva injunction against a few of the defendants. The Mareva injunction was enforced. The affected defendants were each prohibited from disposing or dealing with their own assets up to approximately RM1m, which is the amount of the plaintiff's claim against each of them. Those affected defendants applied to set aside the ex parte Mareva injunction. Should the ex parte Mareva injunction be set aside?

[2] Also, the plaintiff's ex parte application for the Mareva injunction — encl 5 — was made inter partes, so that those defendants could be heard in an inter partes hearing. Should the Mareva injunction be granted inter partes?

THE PARTIES

[3] The plaintiff sues the first defendant ('Teo') for breaches of statutory duty and fiduciary duty, and for conspiracy to injure. The plaintiff sues the other defendants for dishonest assistance and for conspiracy to injure.

[4] The affected defendants in these proceedings are the seventh defendant: Leader Food Sdn Bhd ('Leader Food'), and the eighth defendant: Taha Food Sdn Bhd ('Taha Food').

[5] I use these abbreviations here, for the ease of reference, because these were the abbreviations that were used by the parties in their pleadings, affidavits and written submissions.

THE APPLICATIONS/ENCLOSURES FOR DISPOSAL

[6] Leader Food's and Taha Food's joint application to set aside the Mareva injunction is encl 30. Teo's application to set aside the Mareva injunction is encl 32. The plaintiff's application for the Mareva injunction, made inter partes, is encl 5.

[7] These three encls were decided one after the other. Leader Food and Taha Food's encl 30 was heard first. A decision was made on encl 30. Then Teo's encl 32 was dealt with, and an order was made on it. More on encl 32 later. Then the plaintiff's inter partes encl 5 was heard, and an order was made.

[8] I am writing one judgment to encompass all three enclosures.

THE TERMS OF THE MAREVA INJUNCTION

[9] In brief, the Mareva injunction prohibits Teo, Leader Food and Taha Food from disposing, dealing with or diminishing the value of any of their assets, including monies, up to the value of RM1,116,617.64

[10] There are other terms providing for the disclosure of information and the discovery of documents about Teo's, Leader Food's and Taha Food's assets, but those terms are not pertinent to this judgment.

[11] And as usual, the penal notice under O 45 r 7 of the Rules Of Court 2012 ('the ROC') is endorsed on the Mareva injunction to forewarn Teo, Leader Food, Taha Food and their directors.

THE ELEMENTS FOR AN EX PARTE MAREVA INJUNCTION

[12] First, I set out the principles to follow when considering to grant a Mareva injunction. The authorities on Mareva injunctions establish that the plaintiff must fulfil three elements. The plaintiff must demonstrate that:

(a) the plaintiff has 'a good arguable case' against the defendants;

(b) Teo, Leader Food and Taha Food have assets in Malaysia; and

(c) there is 'a real risk of dissipation or secretion of assets so as to render any judgment which the plaintiff may obtain nugatory':
S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1

MLJ 62; [1985] CLJ Rep 280 (FC); *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153; [1989] 2 CLJ 93 (SC). A

[13] In *Creative Furnishing* at pp 154–155, the Supreme Court, through His Lordship Mohamed Azmi SCJ, set out the elements for a Mareva injunction, but also gave a caveat against readily granting such injunctions: B

> In *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 at p 100, this court by a majority had referred to the importance of the relief by way of a Mareva injunction for the purpose of preserving assets and preventing a defendant from dissipating his assets within jurisdiction before judgment. But the remedy is *not of unlimited application*. On the facts of the appeal before us, the respondent must satisfy the court *firstly*, that he had *a good arguable case*, secondly, that the appellant had *assets within jurisdiction*, and thirdly, that there was *a real risk of the assets being dissipated or removed before judgment* in that *there must be solid evidence to establish the risk*. In our opinion, mere refusal to pay a disputed debt and issuing of a dishonoured personal cheque by a director of the second defendant (who was not a party in this appeal), as presented before the learned judge, fell far too short of the necessary evidence to establish real risk of dissipation of assets of the appellant before judgment. (Emphasis added.) C D

[14] Applying for a Mareva injunction is an onerous endeavour. Applying for a Mareva injunction ex parte, without the presence of the opposite party, is an even more onerous task. E

[15] To uphold the rules of natural justice, the ROC and our procedural law, place — in fact, *mandate* — certain obligations on the plaintiff to strictly adhere to, so that the plaintiff is *eligible* to be considered to be given an ex parte Mareva injunction. F

[16] There are certain requirements or prerequisites that the plaintiff must comply with, to be granted an ex parte injunction. The requirements are prescribed in O 29 r 1 of the ROC. G

[17] The relevant portions of O 29 r 1 read as follows:

> Order 29. Interlocutory injunctions, interim preservation of property H
>
> Application for injunction (O 29 r 1)
>
> (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's originating process, counterclaim or third party notice, as the case may be. I
>
> (2) Such application may be made by a notice of application supported by an affidavit and where the case is one of *urgency*, may be made *ex parte*.
>
> (2A) The affidavit in support of an application made ex parte *must contain* a clear and concise statement of —

A
(a) the facts giving rise to the claim;

(b) the facts giving rise to the application for interim injunction;

(c) the *facts relied on to justify* the application ex parte, including details of any notice given to the other party or, *if notice has not been given, the reason for not giving notice*;

B

(d) *any answer by the other party* (or *which he is likely to assert*) *to the* claim or *application*;

(e) *any facts which may lead the court not to grant* the application ex parte or *at all* ... (Emphasis added.)

C

[18] To be heard ex parte and to be given this ex parte Mareva injunction, there are at least five requirements that the plaintiff must satisfy in their application. The requirements that the plaintiff must necessarily demonstrate to make their application ex parte and be heard ex parte — that is, without Teo's, Leader Food's and Taha Food's presence — are that:

D

(a) their application is *urgent*;

(b) they must *state the facts* that they rely on *to justify* their application ex parte in other words the *reasons* that *they need to be heard ex parte*;

E

(c) as they did not give notice to Teo, Leader Food and Taha Food — they must state the *reasons* that *they did not give notice*;

(d) they must state any *answer* by Teo, Leader Food and Taha Food, or the *answer* that Teo, Leader Food and Taha Food *is likely to assert*; and

F

(e) they must state any *facts which may lead* the court *not to grant* the application ex parte.

G
NON-COMPLIANCE WITH THE STRICT REQUIREMENTS OF O 29 R 1(2) and O 29 R 1(2A) FOR EX PARTE INJUNCTIONS

[19] When the plaintiff endeavours to satisfy these requirements, the plaintiff has to do what is counter-intuitive. It is almost as if the plaintiff is obligated *to speak for* Teo, Leader Food and Taha Food; to speak *in their favour* and to let the court know what *the plaintiff expects them to say*.

H

[20] I find that the plaintiff has not sufficiently and purposefully satisfied these O 29 r 1(2) and O 29 r 1(2A) requirements. Instead, I find that in their affidavit in support (encl 6), the plaintiff merely regurgitated the *words and phrases used* in O 29 r 1(2) and O 29 r 1(2A) *to describe the requirements*, *without adequately particularising* them.

I

[21] The plaintiff's averments include:

(a) Teo, as one of the plaintiff's directors, owed statutory and fiduciary duties to the plaintiff;

(b) Teo also owed a duty of confidence to the plaintiff;

(c) Teo breached these duties by setting up the businesses of Leader Food and Taha Food, through the other defendants, to compete with the plaintiff;

(d) Teo diverted the plaintiff's suppliers and customers to Leader Food and Taha Food;

(e) Leader Food, Taha Food and the other defendants rendered dishonest assistance to Teo;

(f) all the defendants conspired to injure the plaintiff; and

(g) the loss and damage to the plaintiff was quantified at RM1,116,617.64 — the Mareva amount.

[22] These averments may well substantiate the plaintiff's causes of action, and support the plaintiff's claim against Teo, Leader Food and Taha Food. But what about the plaintiff's averments to satisfy O 29 r 1(2) and O 29 r 1(2A)?

[23] The plaintiff purported to make the averments to satisfy O 29 r 1(2) and O 29 r 1(2A) in Part L of their affidavit in support, particularly through paras 101–104.

[24] First, in para 101 of their affidavit in support, the plaintiff averred: 'The facts giving rise to the claims made against Teo, Leader Food and Taha Food have been adequately set out above. The facts have also been set out in the Statement of Claim'. But these are averments of fact that relate only to the plaintiff's causes of action and the claim against the defendants. They are *not* averments of fact that satisfy the requirements of O 29 r 1(2).

[25] The first omission is under O 29 r 1(2) — that the application is *urgent*. The plaintiff omitted to demonstrate why their application must be heard *urgently*. They did not demonstrate the *urgency* of their application. For example, they did not show that it is *likely*, or *expected*, that Teo, or Leader Food, or Taha Food will *soon dissipate* their assets out of Malaysia, beyond the reach of the plaintiff.

[26] Second, in para 102 of their affidavit in support, the plaintiff averred that 'the facts relied on to justify' the ex parte Mareva application 'have also been adequately set out above'. But what was 'set out above' in the earlier parts

of their affidavit in support was, as I mentioned, merely about their causes of action and their claim against the defendants. These averments do not satisfy the requirements of O 29 r 1(2A).

[27] The second omission is under O 29 r 1(2A)(c) — the facts relied on to *justify* an ex parte application. The plaintiff submits that they are entitled to an ex parte Mareva injunction, by *generally asserting* that Teo has breached statutory, fiduciary and confidence duties, and conspired with Leader Food and Taha Food. I find these general assertions insufficient for the purpose of satisfying the requirements of O 29 r 1(2A)(c).

[28] It is akin to the plaintiff submitting that the facts that they rely on *to justify* having their Mareva application *heard ex parte*, are the very facts that they have *already stated* in their statement of claim. But those facts do not demonstrate to me *the reasons* that they should be heard ex parte.

[29] Third, in para 102 again, the plaintiff averred: 'No notice has been given to Teo, Leader Food and Taha Food' for the Mareva application for these reasons:

(a) 'the facts averred herein (in the earlier parts of the affidavit in support, about Teo's breaches of duty and about the conspiracy among the defendants) sufficiently explain the necessity in moving the court on an *urgent ex parte basis*';

(b) the 'nature' of the Mareva application 'essentially dictate as such'; and

(c) 'secrecy is an essential element given the dishonest conduct by Teo'.

[30] The third omission is also under O 29 r 1(2A)(c) — if no notice is given, the plaintiff must state the reason for not giving notice. I find *no meaningful explanation* in the plaintiff's statement above, as to why they *did not give notice* to Teo, Leader Food and Taha Food.

[31] I understand the plaintiff's statement to mean that the plaintiff did not give notice of their application to Teo, Leader Food and Taha Food *because* the plaintiff's causes of action for breaches of statutory, fiduciary and confidence duties, and for conspiracy against the defendants, make it *necessary* for the Mareva application to be heard ex parte and *urgently*. But I find that this is not necessarily so. It does not follow.

[32] If an averment such as this is sufficient to *justify not giving notice* to the opposite side — against whom an ex parte Mareva injunction is sought — then it would be *unfairly easy* for any plaintiff to apply for and obtain an ex parte Mareva injunction. All that a plaintiff has to do to satisfy the O 29 r 1(2A)(c)

requirement, is to state that the material facts pleaded in the statement of claim about the defendant's alleged wrongdoing, inherently justify not giving notice to the defendant. It will tend to make O 29 r 1(2A)(c) redundant and ineffectual.

[33] The other reason that the plaintiff suggests for not giving notice to Teo, Leader Food and Taha Food is that the 'nature' of Mareva injunctions 'dictate' that the application be kept a secret. I also find this averment not necessarily so.

[34] It seems to me that what the plaintiff is saying is that they want to keep the Mareva application a secret. If Teo, Leader Food and Taha Food know about it, this knowledge *will* cause them to dissipate their assets. The secretive nature of a Mareva application is the very reason that they do not want to give notice to Teo, Leader Food and Taha Food.

[35] In other words — the plaintiff says that the Mareva application should be kept secret; the plaintiff does not want to give notice; the reason that the plaintiff does not want to give notice is that it should be kept secret. This, to me, is a circular argument.

[36] It is my finding, even though I am mindful of the often-requested need for secrecy for a Mareva application, that there is, first and foremost, a duty to give notice to the opposite side, because the opposite side will not be heard on the merits. If the applicant plaintiff does not want to give notice, the applicant has to justify the reason for not giving notice. It is not enough to say that the 'nature' of a Mareva application is that it needs to be made in secret.

[37] Put differently, the applicant should not be allowed to *by-pass* this obligation to give notice of an injunction application, just by submitting that Mareva applications need to be made with secrecy.

[38] Fourth, in para 103 of their affidavit in support, the plaintiff attempts to state the *answer* that Teo, Leader Food and Taha Food are likely to give, in opposing the Mareva application. But all that the plaintiff states here is that 'it is conceivable' that Teo, Leader Food and Taha Food will 'deny any breaches of duty', and 'deny that there was any conspiracy', and 'deny dishonest assistance'.

[39] The fourth omission is under O 29 r 1(2A)(d) — the *answers* that Teo, Leader Food and Taha Food *will likely give*, to oppose the application. I am of the view that this O 29 r 1(2A)(d) requirement — disclosing the answers in opposition against the grant of a Mareva injunction — serves a specific purpose.

[40] Since the plaintiff was moving the court to grant an ex parte Mareva injunction, the plaintiff must inform the court what the plaintiff themselves *expect* Teo, Leader Food and Taha Food to say to oppose the Mareva. It is entirely unhelpful if the court is simply informed that the plaintiff expects Teo, Leader Food and Taha Food to oppose the Mareva application. It is *a given* that Teo, Leader Food and Taha Food will oppose the grant of a Mareva injunction. A Mareva injunction may significantly *hinder* Teo's use of his own assets, and may significantly *hinder*, if not *cripple*, Leader Food's and Taha Food's business operations.

[41] Order 29 r 1(2A)(d) dictates that the plaintiff must reduce to particulars and inform the court the *why* and the *what* — why would Teo, Leader Food and Taha Food oppose an ex parte Mareva application? What may their reasons be?

[42] And only when the court knows the two competing merits, can the court consider and *fairly decide* whether to grant an ex parte Mareva injunction — as if Teo, Leader Food and Taha Food *had spoken up to voice their opposition* to the application.

[43] Order 29 r 1(2A)(d) requires that the plaintiff states what Teo, Leader Food and Taha Food *will or are likely to say* to oppose the Mareva application. This, to me, the plaintiff did not fulfil.

[44] I find that among the facts or matters that Teo is expected to assert, or is likely to assert, in answer to the plaintiff's claim or in answer to the Mareva application, which are relevant for the court to consider — and note that these facts and matters are *known to the plaintiff* — include:

(a) the other director-cum-shareholders of the plaintiff: Pamella Chiang and Yurisa Chiang, together hold 60% of the shares in the plaintiff. They have majority control of the plaintiff. Teo asserts that he has to get their consent before he can buy stocks for the plaintiff from their suppliers. Teo asserts that he 'operates in a limited scope and capacity'. Teo asserts that he is only authorised to sign for transactions that amount to RM10,000 or below. And Teo asserts that he is not authorised to sign for transactions in US Dollars; and

(b) Teo asserts that the plaintiff transacts with two Singapore-incorporated companies that are in direct competition with the plaintiff. These companies are Kwee Gee Pte Ltd and Provident Endeavours Pte Ltd. Pamella Chiang is a director and shareholder, and Yurisa Chiang is a shareholder, of Kwee Gee Pte Ltd. Pamella Chiang and Yurisa Chiang are directors of Provident Endeavours Pte Ltd. Teo asserts that Pamella Chiang and Yurisa Chiang *used* the plaintiff to sell goods to these

companies 'at very favourable pricing and at cost'. Teo asserts that these two companies were 'reaping profits at the plaintiff's expense', to benefit the companies' shareholders.

[45] But the plaintiff did not disclose these facts in their Mareva application.

[46] Fifth, in para 104 of their affidavit in support, the plaintiff states that they are 'unaware of any matters and/or facts which might lead this Honourable Court to refuse the Mareva application', 'on an ex-parte basis'.

[47] The fifth omission is under O 29 r 1(2A)(e) — the plaintiff must state any facts that may lead the court *not to grant* the application ex parte, or *not to grant* the application *at all*. The plaintiff appears to just *cursorily say* that they were unaware of such facts. Again, the plaintiff merely recites the statements, in an attempt to *superficially satisfy* this requirement.

[48] So, to my mind, the plaintiff has not satisfied the requirements of O 29 r 1(2) and O 29 r 1(2A)(c), (d) and (e).

THE LAW ON THE EXTENT OF THE STATEMENTS THAT THE PLAINTIFF MUST MAKE UNDER O 29 R 1(2A)

[49] First, I reiterate that to obtain an ex parte injunction, *strict compliance* with O 29 r 1 is *a must*. If there is non-compliance, the ex parte injunction should be set aside.

[50] Also, mere 'lip-service' to the requirements of O 29 r 1(2A) for an ex parte injunction application, is not satisfactory: *University of Malaya Medical Centre v Choo Chee Kon & Anor* [2008] 3 MLJ 278; [2008] 5 CLJ 295 (HC).

[51] In *University of Malaya Medical Centre*, His Lordship Mohd Hishamudin J (as he was then) had this to say about the compliance with the requirements of O 29 r 1(2A) of the previous Rules of the High Court 1980:

> [19] In the present case, in seeking to set aside the ex parte injunction order of 21 October 2004, *the defendants contend*, among others, that the plaintiff had *failed to give notice* of the ex parte application to the defendants when the plaintiff applied for the ex parte injunction order; *or*, alternatively *to explain satisfactorily as to why such a notice was not given* to them. The giving of notice of the ex parte application (or the furnishing of an explanation in the ex parte application where such notice was not given) is *required by* O 29 r 1(2A)(c) of the RHC.
>
> [20] In my judgment, *there is a merit in the defendants' contention* that the plaintiff's *failure to give notice was not justified* ...

A [21] Hence, on 20 October 2004 the plaintiff and their solicitors were making the necessary preparation for the filing of the ex parte application and they expected to file the ex parte application the following day, 21 October 2004 ... This being the scenario, *the plaintiff could have — and should have — notified* the defendants on the 20 October itself of its intention to file ... so that the defendants could have alerted
B their solicitors; and so that the defendants' counsel could appear before the court at the hearing of the ex parte application and to apply *to be given the opportunity to be heard on an ex parte opposed basis*. But the plaintiff's ... solicitors chose not to inform the defendants of the ex parte application. *Even* in the morning of 21 October *when the solicitors for the plaintiff was set to file the ex parte application, the defendants were still not informed* — although the plaintiff had ample opportunity to do so, if the
C plaintiff had taken the matter of giving notice seriously; which as a matter of law the plaintiff should ...

[23] In my judgment, there was *no satisfactory explanation* whatsoever proffered to the court *as to why the defendants were not given notice* on 20 October 2004 (or at the very least on the morning of 21 October) ...

D [24] This is *too vague an explanation* and *too lame an excuse*. The legal *burden is on the plaintiff* to *satisfy the court* as to *why it failed to give notice* to the defendants. In my opinion, in the present case, the duty to give notice arises on 20 October itself when the plaintiff made the decision to file the ex parte application on 21 October. In my judgment, upon examining the explanation furnished ... I find that the plaintiff has
E failed to furnish a satisfactory explanation as to why notice of the ex parte application was not given to the defendants. The plaintiff alleges that there was 'time constraint'. Why was there 'time constraint' (*kesuntukan masa*)? *The plaintiff must give the court a clear explanation, — not a general or a vague explanation*. My finding is that clearly there is no satisfactory explanation given by the plaintiff. In
F arriving at my finding ... I also take into account of the following facts. The defendants were not elusive parties; nor were they strangers to the plaintiff ... it is clear to me that *the plaintiff has taken the legal duty to inform the defendants of the ex parte application, or the legal duty to explain to the court for the omission in giving such notice, very lightly*. In my judgment, the averment ... is nothing but a *mere lip service effort*.

G [25] Thus, there is clear non-compliance of O 29 r 1(2A)(c) of the RHC. Order 29 r 1(2) and (2A)(c) of the RHC stipulates:

> (2) Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte by summons supported by an affidavit but,
H except as aforesaid, such application must be made by summons.
>
> (2A) The affidavit in support *shall* contain a clear and concise statement:
>
> > (c) of the facts relied on as justifying application ex parte, including details of any notice given to the defendant or, *if none has been given*, *the reason for giving none*

I [26] According to the *Malaysian High Court Practice, 2001 Desk (Ed 1)*, at p 1032, para [29.1.17]:

> The requirements in r 1(2A) are mandatory. Thus, *where a plaintiff fails to give notice* of an application made ex parte *out of fear that it will defeat the purpose of*

the proceedings, the plaintiff *must state* in his supporting affidavit *the reasons why notice in advance was not given* to the defendant. As the introductory sentence in r 1(2A) states that the affidavit 'shall contain a clear and concise statement', the *statement must be stated clearly and concisely and may not be implied*: *Delimec Hygiene Sdn Bhd v EMIC (M) Sdn Bhd* [2001] 5 MLJ 186 at p 197. *The consequence* of the plaintiffs *failure to comply* with r 1(2A) is that the *injunction must be discharged*. *To do otherwise would defeat the policy* behind the introduction of r 1(2A): *UMAS Sendirian Berhad v RHB Bank Berhad & Anor* [2001] 1 AMR 1024.

[27] In my judgment, *compliance with r 1(2A)(c) is mandatory*. If there had been non-compliance, it is a *very serious breach of the RHC* and *the ex parte order must be set aside*. This approach is *consistent with the policy behind the introduction of r 1(2A)*. I therefore, set aside the ex parte injunction order due to non-compliance of r 1(2A)(c) of the RHC. (Emphasis added.)

[52] Second, in my view, non-compliance with the requirements of O 29 r 1 is related to the principle that in an ex parte application, the applicant must make *full and frank disclosure* of all relevant and material facts (and evidence), *both favourable and unfavourable* to the applicant.

[53] In my view, the rationale for disclosing both favourable and unfavourable matters in an ex parte hearing is that in the subsequent inter partes hearing, when the *unfavourable matters* are *eventually disclosed* by the opposite side — it is likely that the ex parte order will indeed be set aside as a matter of course. This consequence would have brought about a *waste of judicial time*. It is also fundamentally to *prevent an abuse of the process of the court*.

[54] Now if an applicant in an ex parte application does not comply with the strict requirements of O 29 r 1 — which means that the applicant does not comply with the duty to make full and frank disclosure — the ex parte injunction can be set aside, *even if after eventual full disclosure*, the *court is of the view that the injunction should have been granted*: *Kosma Palm Oil Mill Sdn Bhd v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316; [2004] 1 CLJ 239; [2004] 1 AMR 417 (CA). (Note: This Court of Appeal *Kosma Palm Oil Mill* judgment — about the duty to make full and frank disclosure when making an ex parte injunction application, is a *different* judgment to the Federal Court *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1; [2003] 5 AMR 758 — which solidified the test of 'special circumstances' for a stay of execution.)

[55] The Court of Appeal in *Kosma Palm Oil Mill*, through His Lordship Richard Malanjum JCA (as he was then), held:

[33] It is trite law that in any *ex parte application* it is *essential* that there *must be frank*

and fair disclosure of all relevant materials including points that may be *unfavourable to an applicant*. In *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Law Rep 428, his Lordship Bingham J (as he then was) said this at p 437:

> Failure to make full and fair disclosure
>
> The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the *utmost good faith* and *disclose his case fully and fairly*. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He *must identify* the *crucial points for and against the application*, and *not rely on general statements* and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and *identify any likely defences*. He must *disclose all facts* which *reasonably could or would be taken into account by the judge* in deciding — whether to grant the application. It is *no excuse* for an applicant to say that he was *not aware of the importance* of matters he has omitted to state. *If the duty of full and fair disclosure is not observed, the court may discharge the injunction even if after full enquiry, the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure.* Most of these principles are established by authorities such as *Rex v The Kensington Income Tax Commissioners* [1917] 1 KB 486; *Thermax Ltd v Schott Industrial Glass Ltd* (1981) FSR 289; *Wardle Fabrics Ltd v G Myristis Ltd* (1984) FSR 263; *BankMellat v Nikpour* (1985) FSR 87 ... (Emphasis added.)

ENCLOSURE 30: LEADER FOOD AND TAHA FOOD'S APPLICATION TO SET ASIDE THE EX PARTE MAREVA INJUNCTION

[56] In the context of granting an ex parte Mareva injunction, the compliance or non-compliance with the requirements of O 29 r 1 and the requirement of full and frank disclosure — is *significant and decisive*.

[57] I find that the plaintiff did not comply with the requirement of O 29 r 1(2) — the plaintiff *merely stated* that their Mareva application was urgent. But the plaintiff did not demonstrate the urgency. The plaintiff did not explain the reason that it must be heard urgently.

[58] I find that the plaintiff did not comply with the requirement of O 29 r 1(2A)(c) — the plaintiff did not give a clear and satisfactory statement of the facts relied on *to justify an ex parte hearing* of the Mareva application.

[59] I find that the plaintiff did not comply with another requirement of O 29 r 1(2A)(c) — the plaintiff did not give notice of their ex parte Mareva application, and more importantly, did not give *good reasons* for *not giving notice*. I reiterate that the plaintiff merely stated that the nature of a Mareva

application is that it should be made in secret.

[60] I find that the plaintiff did not comply with the requirement of O 29 r 1(2A)(d) — the plaintiff did not give a specific statement about the *answers* that Teo, Leader Food and Taha Food *would assert*, or *would likely assert*, to oppose the Mareva application.

[61] And I find that the plaintiff did not comply with the requirement of O 29 r 1(2A)(e) — the plaintiff did not give a clear and assessable statement about the *facts* that *may lead the court not to grant* the ex parte Mareva injunction, or not to grant the Mareva injunction *at all*.

[62] In my view, if, generally, plaintiffs can obtain a Mareva injunction, ex parte, and be deemed to have satisfied the O 29 r 1(2) and O 29 r 1(2A) requirements by simply stating, without particulars, what the plaintiff has stated here — that secrecy is essential for their application; that giving notice to the defendants will in fact cause the defendants to dissipate their assets; that they expect the defendants to merely deny their claim; that they cannot think of any facts (even in a heavily contested dispute such as this matter) that might lead the court not to grant the Mareva ex parte or not to grant the Mareva at all — then it will be *rather relatively easy* for plaintiffs in civil suits to procure Mareva injunctions.

[63] And such plaintiffs will, in effect, easily obtain the *advantage* of an 'advance security' for the payment of a *presumed ultimate judgment* against the defendants, at the stage where the dispute proper is nowhere near to being determined yet.

[64] I am of the view that the *procedural path* to obtain Mareva or Mareva-type injunctions is *not meant* to cause this circumstance.

[65] I am also both guided and bound by the findings of the Federal Court in *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260; [1982] 1 LNS 34 (FC). The Federal Court, through His Lordship Raja Azlan Shah CJ (Malaya) (as he was then), *cautioned* against a *liberal exercise* of the court's power to grant Mareva injunctions.

[66] His Royal Highness held (at [1982] 1 MLJ 260 at p 262) that the power of the courts to grant Mareva injunctions:

> ...must not be debased into something invoked to obtain *security for a judgment in advance*, or *pressuring a defendant into a settlement*. 'The courts must be vigilant to ensure that *a Mareva defendant is not treated like a judgment debtor*' (see *AJ Bekhor & Co Ltd v Bilton* ([1981] 2 All ER 577). It is consequently not accurate to refer to a Mareva injunction as a pre-trial attachment (see *Cretanor Maritime Co Ltd v Irish*

Maritime Management Ltd [1978] 1 Lloyd's Rep 425).

[67] And so, because the plaintiff did not comply with the requirements of O 29 r 1(2) and O 29 r 1(2A)(c), (d) and (e), I allow encl 30 — Leader Food's and Taha Food's application to set aside the ex parte Mareva injunction — with RM25,000 costs to be paid by the plaintiff to Leader Food and Taha Food. Costs are subject to the allocatur. I also order Leader Food's and Taha Food's damages to be assessed.

ENCLOSURE 32: TEO'S APPLICATION TO SET ASIDE THE EX PARTE MAREVA INJUNCTION

[68] At the hearing, after I rendered my summarised oral grounds and made an order on encl 30 — setting aside the ex parte Mareva injunction against Leader Food and Taha Food — I asked to hear encl 32. But counsel for the plaintiff informed me that the plaintiff and Teo, through their respective counsel, had agreed on the terms of a consent order on encl 32. The consent order was for encl 32 to be allowed as well, but with the plaintiff paying to Teo costs of RM10,000.

[69] I took it that the plaintiff and Teo came to that agreement because of my decision to set aside the ex parte Mareva injunction as against Leader Food and Taha Food, and the grounds that I gave for doing so. And I was given the impression that *because* there was an agreement to record a consent order, the *agreed costs* between the plaintiff and Teo was only RM10,000 — which was much less than the RM25,000 between the plaintiff, and Leader Food and Taha Food.

[70] There were no oral arguments on encl 32. Parties asked for the agreed terms to be recorded.

[71] I am of the view that the order recorded on encl 32 is a consent order, and should not be appealable.

[72] Nevertheless, *if* the order that I recorded or made on encl 32 *is appealable*, and the plaintiff's appeal against the order is *competent*, and I am to give my grounds for allowing encl 32 — setting aside the ex parte Mareva injunction against Teo — my grounds would be the same grounds as the grounds for allowing encl 30.

[73] Enclosure 32 — Teo's application to set aside the ex parte Mareva injunction — is allowed with RM10,000 costs to be paid by the plaintiff to Teo. Costs are subject to the allocatur. I also order Teo's damages to be assessed.

ENCLOSURE 5: PLAINTIFF'S INTER PARTES APPLICATION FOR A MAREVA INJUNCTION

[74] As the ex parte Mareva injunction was set aside, the plaintiff wanted encl 5 — the plaintiff's application for a Mareva injunction — to be heard inter partes, and for an order to be made on it.

[75] So, I now consider if the plaintiff has adequately demonstrated the three elements necessary to be granted a Mareva injunction.

DOES THE PLAINTIFF HAVE A GOOD ARGUABLE CASE?

[76] The first element that the plaintiff must demonstrate is that they have 'a good arguable case' against the defendants. What 'a good arguable case' means is that the plaintiff's case is 'more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than fifty present chance of success': *S & F International Limited*, at p 64L

> Mustill, J., held in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH & Co KG KG* [1984] 1 All ER at p 413 ; [1983] 1 WLR 1412 at p 398 on appeal to CA that: ...
>
> > (1) Before a *Mareva* injunction will be granted, a plaintiff must show first that he has *a good arguable case*, which is *more than being barely capable of serious argument*, *but not necessarily* one that the judge believes has got *more than fifty per cent chance of success*. (Emphasis added.)

[77] Looking at the pleadings — the plaintiff's statement of claim, Teo's defence and counterclaim, Leader Food's defence and Taha Food's defence — I find that the plaintiff has a good arguable case.

DO TEO, LEADER FOOD AND TAHA FOOD HAVE ASSETS IN MALAYSIA?

[78] This element is not disputed. Teo, Leader Food and Taha Food have assets within the jurisdiction.

IS THERE A REAL RISK THAT TEO, LEADER FOOD AND TAHA FOOD WILL DISSIPATE THEIR ASSETS TO NEGATE A JUDGMENT IN THE PLAINTIFF'S FAVOUR?

Applicable principles

[79] I will first set out some of the governing principles that I have to apply, to decide on the issue of the real risk of Teo, Leader Food and Taha Food dissipating their assets.

[80] A Mareva injunction is an order to freeze Teo's, Leader Food's and Taha Food's assets, to prevent them from dissipating their respective assets, so that they do not frustrate an ultimate judgment that may be entered against them.

[81] I am not concerned with, say, assets that were conveyed over by the plaintiff to Teo, Leader Food or Taha Food, or monies that were paid over by the plaintiff to Teo, Leader Food or Taha Food, or assets or monies that the plaintiff alleges are held on trust or held beneficially for the plaintiff. I am here concerned only with Teo's *personal assets* and Leader Food's and Taha Food's *company assets*.

[82] First — the plaintiff must *demonstrate* this real risk of dissipation, *not merely by asserting it*. In other words, *not just by saying so*. The plaintiff must instead demonstrate this real risk, not merely by *arguing that the risk is there*. The plaintiff must demonstrate this real risk of dissipation by a *preponderance of evidence* — evidence that it is *likely* that Teo, Leader Food or Taha Food *will* dissipate their assets, for *the sole premeditated purpose* of frustrating the plaintiff's judgment.

[83] The Federal Court in *S & F International* at p 64, through His Lordship Abdoolcader FJ, citing with approval the UK case of *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Nidersachsen* [1984] 1 All ER 398, held:

> ... (2) Before such relief is granted the plaintiff must secondly show that there is a risk that assets will be dissipated: he must demonstrate this by *solid evidence*, eg that *the defendant's previous actions show his probity is not to be relied upon* or *that the corporate structure of the defendant infers that it is not to be relied upon*... (3) In reaching its conclusion, the court should take into account the defendant's *evidence* as well as the plaintiff's. The English Court of Appeal in dismissing an appeal by the plaintiffs in that case ([1983] 1 WLR 1412; [1984] 1 All ER at p 413) restated the principles of *Mareva* applications and held that the jurisdiction to grant *Mareva* injunctions was exercisable in cases where it appeared just and convenient to the court to grant the injunction, and the plaintiff had, inter alia, to show, on the *evidence* as a whole, that there was at least a good arguable case that he would succeed at the trial, and *that a refusal of an injunction would involve a real risk that a judgment* or award *in his favour would remain unsatisfied because of the defendant's removal of assets* from the jurisdiction or dissipation of assets within the jurisdiction. (Emphasis added.)

[84] I am guided by, and agree with, Her Ladyship Noorin Badaruddin J in *Toyota Tsusho (M) Sdn Bhd v Lau Kum Foon & Ors* [2019] 10 MLJ 596; [2019] 4 CLJ 110 (HC), where she reasoned that when there is *no evidence*, or *insufficient evidence*, to show that there were attempts by the opposite party to dissipate their own assets, a Mareva injunction should not be ordered against the opposite party.

[85] Her Ladyship held: A

> [36] ... examples of conduct that justify a finding that there is a risk of dissipation of assets are illustrated from cases highlighted by the plaintiff such as:
>
> (a) *Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261 where there is '*solid evidence* that the probity of the defendant could not be relied on'; B
>
> (b) *Amixco Asia Pte Ltd v Bank Negara Indonesia 1946* [1992] 1 SLR 703 where the Singapore Court of Appeal found that there is '*prima facie dishonest conduct*';
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> C
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> (c) *Honsaico Trading Ltd v Hong Yiah Seng Co Ltd* [1990] HKCU 429; [1990] HKCA 297 where the Hong Kong Court of Appeal stated when there is '*an unacceptable low standard of commercial morality*'; and
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> (d) *Zarina bt Sharil & Anor v Chiong Chuan Hwa & Ors* [2009] 2 MLJ 124 where the High Court stated that the 'illegal conduct' of the defendants '*imputes dishonesty giving rise to a real danger of dissipation*'. D
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> [37] In contrast with the present case ... the plaintiff has failed to show any *evidence* that the defendants had acted dishonestly or lacked of probity which could give rise to a risk that their assets will be dissipated. *No evidence is* proffered to show that ... *there were attempts of dissipation of assets by the defendants*... (Emphasis added.) E

[86] Second — beyond demonstrating that there is a real risk of asset dissipation, the plaintiff must demonstrate to the court that the premeditated dissipation is *done intentionally to avoid a possible judgment*: *Menk Sdn Bhd v Joerg Hugo Schmidt* [2009] 3 MLJ 205; [2010] 3 AMR 488; [2009] 4 CLJ 795 (CA). F

[87] In *Menk*, the Court Of Appeal, through His Lordship Suriyadi Halim Omar JCA (as he was then), held: G

> [32] ... It is trite law that in order to succeed in a Mareva injunction application, *dissipation of assets per se is incomplete unless the applicant also successfully establishes the fact that the dissipation are preemptive acts that would lead to an intentional stultifying of any judgment* that may be obtained. The two ingredients must go hand in hand. H

[88] Third — the real risk of dissipation *cannot be presumed* from the plaintiff's mere allegation that Teo, Leader Food and Taha Food have committed wrongful acts against the plaintiff. I *should not presume* that there is a real risk of dissipation purely from the plaintiff's assertions that Teo, Leader Food and Taha Food are dishonest. *There must be direct evidence* to support the assertions. There must be *evidence* that has a 'real and material bearing' on the risk of dissipation. There must be *evidence* that can *justify an inference* of a real risk of dissipation. I

[89] I refer to, and am bound by, the lucid exposition of the authorities on this issue by the Court of Appeal in the recent case of *Lee Kai Wuen & Anor v Lee Yee Wuen* [2022] MLJU 03411; [2022] 5 AMR 109; [2022] 1 LNS 1057 (CA), through His Lordship Darryl Goon Siew Chai JCA, where, after a methodical analysis of the authorities, he propounded as follows:

> [94] *The need for evidence of a real risk of dissipation of assets* was also *central* to the decision of the Federal Court in *Zainal Abidin Bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260, where his Royal Highness, Raja Azlan Shah CJ (Malaya) stated in respect of a Mareva injunction at p 264:
>
> > The appellant still has to establish the second requirement, that is in order to gain the particular form of protection sought by the injunction *he must show that there is a danger that the company's available assets will be dissipated to prejudice the appellant's claim. That is a matter of evidence*. (Emphasis added).
>
> [98] To hold that a real risk of dissipation of assets may be *presumed* is *effectively to negate the need to actually establish that such a risk exists*. This, in our view, would be inconsistent with all the settled authorities that a real risk of dissipation is an essential ingredient. This requirement *necessarily means* it is an issue that *has to be established* and in legal proceedings, that can only be achieved *by means of evidence*. The binding authorities of our courts do not in fact establish that there exists any exception to the rule, such that this ingredient may be *presumed* in any identified circumstance.
>
> [99] *What the authorities do establish*, and none so clearly as in the decision in *Ninemia Maritime Corporation* which was expressly quoted by the Federal Court in *S & F International Limited*, and thus a decision binding on this court, *is that there must be evidence of a real risk of dissipation of assets – whether direct evidence or an inference that may properly be drawn from evidence that is led and provided. It may not be presumed*, particularly at an interlocutory stage, *when allegations made of impropriety have yet to be proved. If, however, want of probity or misconduct is so clearly established*, even at the interlocutory stage, *then, depending on the nature of the lack of probity or misconduct, a real risk of dissipation of assets may be inferred — not presumed*.
>
> [100]*As for allegations of misappropriation, dishonesty or lack of probity*, it is a matter of common sense that *even if there exists evidence of these allegations*, they *must also be of a nature that has a real and material bearing on*, or *of a nature that can justify an inference of, a real risk of dissipation* of assets (see *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] SGCA 45; [2015] 5 SLR 558). *Mere allegations* of these nature, *even with some evidence in support of these allegations, would not per se warrant a presumption or inference that there exists a real risk of dissipation of assets*. (Emphasis added.)

Should a Mareva injunction be ordered against Leader Food and Taha Food?

[90] The plaintiff asserts that Teo caused Leader Food and Taha Food to be incorporated, to divert business away from the plaintiff. The plaintiff asserts that Teo is 'dishonest, lacks probity and has low commercial morality'. The

plaintiff asserts that Teo controls, or at least manages, Leader Food and Taha Food. The plaintiff asserts that Teo 'will go to lengths to ensure that he makes maximum profit', to the plaintiff's 'detriment'.

[91] The plaintiff avers that they 'verily believe' that as Teo is involved in Leader Food's and Taha Food's management, 'there is a risk that he will cause Leader Food and Taha Food to dissipate assets to defeat any judgment' that the plaintiff may obtain against them.

[92] Along with the ex parte Mareva injunction, the plaintiff also obtained an anton piller order against Teo, Leader Food and Taha Food. In the enforcement of the anton piller order, the plaintiff avers that Teo, Leader Food and Taha Food were not compliant, and that they attempted to withhold evidence from being discovered. The plaintiff asserts that Teo, Leader Food and Taha Food have a propensity to breach court orders and to hide evidence. And so, it is 'conceivable' that they may dissipate assets to avoid a judgment.

[93] I find that it may well be 'conceivable' that Teo, Leader Food and Taha Food — and most defendants in any monetary claim, for that matter — may dissipate their assets to thwart an ultimate judgment. But this conception, *without evaluable or measurable evidence*, remains a conjecture. There must be an *evidential basis to demonstrate a real risk of dissipation*.

[94] In my judgment, these are the facts and factors that *arise against* the plaintiff's assertion that Leader Food and Taha Food will likely dissipate their assets:

(a) Leader Food and Taha Food are separate incorporated entities. They are businesses. They are under the management of their directors, who have duties to their shareholders;

(b) right up this juncture, they appear to be vigorously contesting the plaintiff's claim against them;

(c) the plaintiff is not Leader Food's and Taha Food's only customer. They have other customers of their own;

(d) as for common customers, it was submitted that the plaintiff's top 20 customers are *not* in the list of Leader Food's and Taha Food's list of customers. This appears to refute the plaintiff's allegation that Teo diverted the plaintiff's customers to Leader Food and Taha Food;

(e) since the ex parte Mareva injunction, Leader Food and Taha Food cannot operate their bank accounts. Monies can be deposited into the accounts but monies cannot be withdrawn. On every occasion that they have needed to make payment from their accounts, they have had to get the plaintiff's approval. They assert that as a result, they have had to

A disclose their pricing trade secrets to the plaintiff. As a further consequence, they have lost their competitive edge as against the plaintiff. The plaintiff is their competitor. Their competitor now controls their payment process;

B (f) they each cannot utilise any part of the Mareva amount of RM1,116,617.64 of their own money to run their businesses;

(g) there is *no direct evidence* of a real risk that Leader Food and Taha Food are likely to dissipate their assets *for the specific purpose* of impeding a possible judgment against them;

C (h) there is no evidence that has a *real and material bearing* that points to a real risk that Leader Food and Taha Food are likely to dissipate their assets. And there is no evidence that *justifies an inference* of that risk;

D (i) the mere allegations that Teo is dishonest, and that he will cause Leader Food and Taha Food to dissipate assets, *do not necessarily infer* that there is a real risk that they will dissipate assets. And I find that the plaintiff's allegations do not infer that risk;

E (j) The authorities, particularly *Lee Kai Wuen*, instruct me that I cannot make the presumption that Teo's alleged dishonesty and misconduct necessarily leads to a real risk of dissipation by Leader Food and Taha Food; and

F (k) to grant a Mareva injunction against Leader Food and Taha Food, at this interlocutory stage, would give to the plaintiff, in my view, an unfair advance security for a judgment that is *not yet* a foregone conclusion.

[95] I therefore find that the plaintiff has not demonstrated that there is a real risk that Leader Food and Taha Food are likely to dissipate their assets, G intended specifically to frustrate a possible judgment in the plaintiff's favour.

Should a Mareva injunction be ordered against Teo?

[96] The plaintiff endeavours to demonstrate a real risk of dissipation by H asserting the *facts* that they rely on to support their *pleaded cause* against Teo, which includes — Teo breached statutory, fiduciary and confidence duties to the plaintiff; Teo set up Leader Food and Taha Food, which are competing businesses; Teo diverted the plaintiff's suppliers and customers to Leader Food and Taha Food.

I

[97] The conclusion that the plaintiff wants the court to draw from these assertions is that, fundamentally, Teo is dishonest. And because he is dishonest, he will likely dissipate his assets so that he can circumvent a judgment against him.

[98] In my judgment, *in additional to* the facts and factors relating to Leader Food and Taha Food that I alluded to above, these are the facts and factors that *bear against* the plaintiff's assertion that Teo will likely dissipate his assets:

(a) Teo denies the charges levelled against him. In fact, Teo lodged a defence and mounted a counterclaim against the plaintiff;

(b) Teo alleges that the persons who truly control and manage the plaintiff are Pamella Chiang and Yurisa Chiang, *not him*;

(c) apart from the RM10,000 allocated to Teo every month, Teo cannot utilise the Mareva amount of RM1,116,617.64 of his own money for his and his family's use;

(d) Teo has a young family, with a three-year-old child;

(e) Teo refutes the allegation of dishonesty and misconduct by assertions that include the following. First, the plaintiff is in the dried fruits, dates, nuts, spices and herbs industry. Teo asserts that the information circulating in this industry, which the plaintiff alleges is confidential, is *not* confidential. Teo asserts that he does not owe the plaintiff a duty of confidence. The veracity of each side's assertions will be determined at trial, not at this interlocutory stage;

(f) also, Teo asserts that he did not cause the plaintiff to purchase products from Leader Food at a higher price than the plaintiff would have paid to other suppliers, to make secret profits. He challenges the plaintiff to prove the allegation that he did. Similarly, the veracity of either side's assertions will be determined at trial, not at this interlocutory juncture;

(g) further, Teo asserts that the plaintiff is not in the business of processing dried fruits and dates. The plaintiff imports dried fruits and dates for wholesale distribution in the local and regional market. Teo asserts that there is no exclusivity in this business. The plaintiff's suppliers and customers are also the plaintiff's competitors' suppliers and customers. Such as Leader Food and Taha Food. That is the reason that the plaintiff, Leader Food and Taha Food have common suppliers and common customers. Teo asserts that in the circumstances, he was not dishonest, nor did he breach his duties to the plaintiff;

(h) the plaintiff's assertions and Teo's opposite assertions will all be tested on their veracity at trial. But the Mareva injunction is sought at this interlocutory juncture, when I am not to minutely examine the affidavit evidence to ascertain the veracity of it all. I am only considering if the plaintiff has shown evidence that satisfactorily point to a real risk of dissipation, according to the standards that the case law authorities demand;

(i) there is no direct evidence of a real risk that Teo is likely to dissipate his assets for the intended purpose of circumventing a judgment against him;

(j) there is no evidence that has a real and material bearing on such a risk. And there is no evidence that justifies an inference of that risk;

(k) the mere allegation that Teo is dishonest, *does not necessarily infer* that there is a real risk that he will dissipate assets. And I hold that the plaintiff's allegations against Teo do not provide a *sufficient basis* to infer that risk;

(l) again, the authorities, particularly *Lee Kai Wuen*, oblige me *not to make the presumption* that Teo's alleged dishonesty and misconduct necessarily lead to a real risk that he will dissipate his assets; and

(m) and similarly, to grant a Mareva injunction against Teo would give, in my view, an unfair advance security for a possible judgment that the plaintiff has to first go through a trial process to obtain.

Balance of convenience

[99] The balance of convenience issue is usually canvassed and argued in interlocutory injunction applications. The balance of convenience principle compels the court to consider whether it is *more just* to grant the injunction than not to grant the injunction. Put differently, the court has to consider and decide which alternative will cause more hardship — the hardship caused to the applicant if the injunction is not granted, or the hardship caused to the opposite side if the injunction is granted.

[100] This balance of convenience test was propounded in the landmark case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316, and the seminal case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293; [1995] 2 AMR 1859 (CA).

[101] But the issue that I am addressing here is — is the balance of convenience principle applicable to an application for a Mareva injunction?

[102] The issue was answered by the Court of Appeal in *Lee Kui Wuen*, where the following principles were propounded:

(a) there is a distinction between Mareva injunctions and other 'non-Mareva' interlocutory injunctions pending trial;

(b) the form of interlocutory injunctions sought in *American Cyanamid* and *Keet Gerald Francis Noel John* were the usual kind of interlocutory

injunctions that *relate to the reliefs* claimed in the 'pleaded causes of action'. The *basis* for such injunctions is the *cause filed* and *reliefs sought* by the plaintiff against the defendant;

(c) Mareva and Mareva-type injunctions are of 'a different character'. A Mareva injunction is not one of the final reliefs sought. A Mareva injunction 'bears no dependence on the final relief' of the cause;

(d) instead, the purpose of a Mareva injunction is 'to prevent an abuse of the legal process' where a party who is facing judgment intentionally dissipates the assets in question, to avoid having to satisfy the judgment. The balance of convenience is not one of the appropriate criteria for consideration when the court is deciding whether to grant a Mareva or Mareva-type injunction;

(e) so, the balance of convenience criterion and other related factors such as 'the adequacy of damages' or the irreparability of the damage that may be caused if the interlocutory injunction is not granted — are *not* factors that need to be considered in a Mareva application; and

(f) the elements that need to be satisfied to obtain a Mareva or Mareva-type injunction remain only these — 'a good arguable case', 'assets in the jurisdiction', and 'a real risk of dissipation of assets' intentioned to render a judgment 'nugatory'.

[103] In *Lee Kai Wuen*, the Court of Appeal, recently, through the elucidation of His Lordship Darryl Goon Siew Chai JCA, pronounced:

> Balance of convenience
>
> [112] *There have been continuing reports of cases that have made reference to the issue of balance of convenience*, both by counsel and also in some cases by the court, *in regard to applications for a Mareva injunction*, see eg *Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd* [2015] MLJU 953; [2015] AMEJ 706; [2015] 5 CLJ 652; *Metrowangsa Asset Management Sdn Bhd & Anor v Ahmad bin Hj Hassan & 4 Ors* [2005] 1 MLJ 654; [2004] 4 AMR 30; *Ananda Kumar Krishnan v LS Fishery Sdn Bhd & Ors* [2021] MLJU 343; [2021] AMEJ 0301; [2021] 1 LNS 641; *EHQ Projects Sdn Bhd & 2 Ors v Equipro Sdn Bhd & 3 Ors* [2007] 7 MLJ 415; [2007] AMEJ 0154; [2008] 7 CLJ 343; *Bright Rims Manufacturing Sdn Bhd v Victor Taichung Machinery Works Co Ltd & Anor* [2008] 4 MLJ 380; [2007] 4 AMR 648; [2007] 4 CLJ 230; *Dynasty Rangers (M) Sdn Bhd v SBSK Plantations Sdn Bhd* [2001] 1 MLJU 439.
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> [113] In *Tsoi Ping Kwan v Loh Lai Ngoh & Anor* [1997] 3 MLJ 165 at pp 168–170; [1997] 3 AMR 2875 at pp 2878 and 2880–2881; [1997] 3 CLJ 552 at pp 554 and 556, Gopal Sri Ram JCA delivering the judgment of this court stated as follows:
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> > There are several issues upon which the disputants before us stand in disagreement. However, we find it necessary to deal with only two of them. ... *The second relates to the question where the balance of convenience or, more*

appropriately, the balance of justice lies. In other words, whether justice favours the grant of a Mareva or its refusal…

Turning to the second issue, it is to be noted that the learned judge, after weighing all relevant factors came to the conclusion that the balance of convenience lay in favour of refusing a Mareva. He said:

> Damages are an adequate remedy to the plaintiff as he will be in a position to quantify his claim in money terms if it is found at trial that the first defendant was a constructive trustee of his shares. However, the second defendant will be immobilised by the injunction and the damages suffered will not be readily quantifiable. As such damages will not be an adequate remedy to the second defendant and the balance of convenience lies in favour of refusing the injunction. (Emphasis added.)

[114] The appeal before the court in *Tsoi Ping Kwan* was one against the refusal by the High Court to grant a Mareva injunction. Although the appeal was dismissed, it was dismissed on the ground that the learned judge had rightly exercised his discretion in refusing to grant the Mareva injunction sought, having concluded that the balance of convenience was against the grant of the Mareva injunction. *However*, from the passage quoted from the decision of the High Court, *it would appear that the decision of the High Court was based not only upon a balance of convenience but also on a conclusion that damages was an adequate remedy* in other words, the plaintiff would not suffer any irreparable damage should the Mareva injunction be refused. The requirement of irreparable damage is yet another factor that would in our view, and with respect, be regarded as being alien to the grant of a Mareva type of injunction for the reasons addressed above.

[115] It would seem to us that *in all these cases where the balance of convenience vis a vis the grant of a Mareva injunction* was considered, *arose from*, *with respect*, *an error in conflating the requirements for the grant of non-Mareva type interlocutory injunctions, with Mareva injunctions* properly so called.

[116] *The balance of convenience is a legal consideration of some antiquity*. In *Mitchell v Henry* (1880) 15 Ch D 181 at pp 191 and 192, a case involving an allegation of a trade mark infringement, James LJ *had regard to the balance of convenience* and *dealt with it* as follows *in an application for an interlocutory injunction*.

[117] In *American Cyanamid Co v Ethicon* [1975] AC 396, *Lord Diplock's employment of this consideration* was predicated on the following, as his Lordship explained in p 406 of the report:

> …The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; *but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies.* (Emphasis added.)

[118] *However, the interlocutory injunctions that Lord Diplock was dealing with was not of a Mareva type of injunction (see also* the decision of this court in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & 2 Ors* [1995] 1 MLJ 193; [1995] 2 AMR 1859). *The interlocutory injunction* that Lord Diplock was concerned with *in American Cyanamid was, in interlocutory form, an injunction that a plaintiff was entitled to as a relief based on a pleaded cause of action*. As Lord Diplock stated in *Siskina (Owners of Cargo Lately Laden on Board) & Ors v Distos Compania Naviera SA* [1979] AC 210 at p 249, '*The distinction drawn by the appellants between an interlocutory and final injunction is merely a matter of form. There must be some underlying cause of action to enable the court to grant an injunction. If no such right is established then neither type of injunction can be ordered.*

[119] As has already been pointed out, *a Mareva injunction is an injunction of quite a different character. It is not the final remedy sought in a cause. Although relevant to, it bears no dependence on, the final relief that is sought in an action* (see statement by Mustill J in *Ninemia Maritime Corporation*). *In none of the authoritative cases in which the Mareva injunction was introduced was it ever stated or required that the balance of convenience is a criterion to be met* (see *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260; *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093; *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509 and *Rasu Maritima SA v Perusahaan Pertambangan Minyak dan Gas Bumi Negara* [1977] 3 WLR 518).

[120] *The jurisdiction* exercised by courts *in the grant of Mareva injunctions is one to prevent an abuse of the legal process* in cases *where there is a real risk* that a litigant facing potential liability may *seek to render any judgment* that may finally be entered against him *impotent* by dissipating or disposing his assets.

[121] *Where it is demonstrated that such a risk exists, we do not see any room for a consideration of the balance of convenience*. Seeking to defeat a judgment of the court in such a fashion cannot be countenanced by any inconvenience that may be proffered. *It is therefore important to distinguish between the basis and criteria for the grant of a non-Mareva injunction from that of a Mareva injunction* (see the analysis in *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown & Anor* [2020] AMEJ 1876; [2021] 7 MLJ 178). In a roundabout way, this distinction also brings home the point, again, that vital to the grant of a Mareva injunction is evidence, direct or indirect, of a real risk of dissipation or disposal of assets to defeat a judgment of the court. It is only where such a risk is properly established that a court would impose what can potentially be a burdensome and harsh order; even before the merits of the claim have yet to be finally determined.

[122] *We therefore doubt that the balance of convenience is, or was ever, a criterion that needs be considered by a court when considering the grant of a Mareva injunction*. This is perhaps significant enough a point for the Federal Court, should an opportunity present, to address and to settle any doubt that may exist. (Emphasis added.)

DECISION

[104] In all the premises, E5 — the plaintiff's inter partes application for a Mareva injunction against Teo, Leader Food and Taha Food — is dismissed

with costs, subject to the allocatur. The plaintiff is to pay Teo costs of RM30,000 and the plaintiff is to pay Leader Food and Taha Food costs of RM15,000, forthwith and in any event by 25 July 2022.

CONCLUSION

[105] Enclosure 30 — Leader Food's and Taha Food's application to set aside the ex parte Mareva injunction is allowed with costs, and with Leader Food's and Taha Food's damages to be assessed, because the plaintiff did not comply with the requirements of O 29 r 1(2) and O 29 r 1(2A) of the ROC.

[106] Enclosure 32 — Teo's application to set aside the ex parte Mareva injunction is also allowed with costs, and with Teo's damages to be assessed, for the same reasons.

[107] Enclosure 5 — the plaintiff's inter partes application for a Mareva injunction is dismissed with costs, on the main ground that the plaintiff has not demonstrated that there is a real risk of Teo, Leader Food and Taha Food dissipating their assets with the intentional purpose of making nugatory a possible judgment that the plaintiff may ultimately obtain against them.

Enclosures 30 and 32 allowed with costs; encl 5 dismissed with costs.

Reported by Dzulqarnain bin Ab Fatar